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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re

HUGO JIMENEZ,

on Habeas Corpus.

B218498

(Los Angeles County
Super. Ct. Nos. KA014004, BH005965)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Patricia M. Schnegg, Judge. Petition granted.

Diane T. Letarte, under appointment by the Court of Appeal for Petitioner.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Senior Assistant Attorney General, Julie A. Malone, Supervising Deputy Attorney General, Amy M. Roebuck, Deputy Attorney General, for Respondent.

Petitioner Hugo Jimenez seeks review of a September 10, 2008 decision of the Board of Parole Hearings (Board) finding him unsuitable for parole. He contends the Board's decision is not supported by some evidence of his current dangerousness. (*In re Lawrence* (2008) 44 Cal.4th 1181.) We agree, and grant the petition.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Commitment Offense

On August 2, 1992, Jimenez and fellow gang members were standing outside a restaurant when the victims drove by in a car. The car made a U-turn and drove towards Jimenez and his group. The occupants gestured towards them, and Jimenez, believing they would be harmed, fired several shots in the car, injuring two of its occupants.

On January 14, 1993, Jimenez entered a plea of guilty to two counts of attempted murder (Pen. Code, §§ 187, subd. (a), 664)¹ and admitted firearm use and gang allegations (§§ 12022.5, subd. (a), 12022.7, 186.22, subd. (b)(1)). The court sentenced him to a term of seven years to life with the possibility of parole on the attempted murder counts, with the sentences to run concurrently, plus a three-year term for the weapon enhancements pursuant to sections 12022.5, subdivision (a) and 12022.7. Sentence pursuant to the remaining enhancements were stayed or stricken.

B. Social History

Petitioner was born in 1974 in Mexico, and came to the United States with his family, which consists of both parents and nine other children, when he was approximately two years old. His parents worked to support the family and he was raised by his older siblings. As a Mexican national, he is on Immigration and Customs Enforcement (ICE) hold.

Jimenez dropped out of high school in the ninth grade because he lost interest in education. He worked on and off and became involved with gangs. He began drinking at age 14, drinking beer on the weekends; at age 15, he began to smoke marijuana on a daily basis.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Jimenez does not have a juvenile criminal record, nor did he have any prior misdemeanor or adult felony convictions. He was arrested as a juvenile for vandalism. Jimenez has no experience in paying bills, planning his life, opening bank accounts, and otherwise has no experience living independently.

His parents live in Fontana, and he has a grandmother and brother in Mexico.

His family visits him often in prison.

C. Prison Record

While in prison, petitioner has participated in alcohol and drug treatment programs (NA and AA) since 1997. Jimenez has completed his GED, and obtained certificates in small engine repair, masonry, and culinary arts. He has obtained his AS, and anticipates completing his AA in business. He has also participated in anger management, attitude of submissiveness, attitude of repentance, and attitude of humility. While in prison, he has made three close friends, and he now feels much closer to his family.

Jimenez has no CDC 115² rule violations, but had four rule 128-As³ (two for absences, one for delay, and one for stealing an onion to make a sandwich.

D. Psychological Evaluations and Insight Into Offense

Jimenez's 2005 evaluation noted low risk factors for relapse and reoffense, finding that he had no prior juvenile or adult record, no record of violence or aggression in prison, and that his overall adaptation to prison life had been positive and constructive. "The inmate acknowledges he committed the offense. He acknowledges the wrongfulness of his actions. The inmate appears to take full responsibility for the offense, and does not appear to rationalize or minimize his role. He appeared to fully express remorse for his actions. . . . This inmate appears to feel guilty for his actions and can empathize at an emotional level of the harm done to the victim and the victim's

² A CDC 115 documents misconduct believed to be a violation of law or otherwise not minor in nature. (Cal. Code Regs., tit. 15, § 3312, subd. (a)(3); *In re Gray* (2007) 151 Cal.App.4th 379, 389.)

³ A CDC 128 documents instances of minor misconduct. (Cal. Code Regs., tit. 15, § 3312, subd. (a)(2); *In re Gray, supra*, 151 Cal.App.4th at p. 389.)

family.” Further, Jimenez demonstrated awareness of the circumstances that led to the offense, and circumstantial and situational factors played a larger role in the commission of the offense. On the other hand, high risk factors for relapse and reoffense included his drug and alcohol use, the fact he was an active participant in the offense, and that the offense involved a vulnerable victim.

Jimenez’s 2007 psychiatric evaluation stated his reasoning was “concrete” and “rule oriented,” and raised some concerns about his “reality testing.” He had no psychiatric record while in prison. Nonetheless, “[o]verall he presented as an earnest individual who has more awareness of his past criminal behavior and regrets it.” Jimenez had polysubstance abuse in institutional remission.

The 2007 evaluation noted that he was involved with a gang at the time of the offense, which was apparently a motivating factor. “Since the victims turned around and returned, he interpreted their actions as indications of danger.” Jimenez denied gang affiliation in prison, stating he had “outgrown” it.

His risk assessment was low, based upon the Psychopathy Check-List Revised 2 (PCL-R 2).⁴ “Mr. Jimenez’s low PCL-R score does not guarantee he will not be violent. But it does not suggest a risk for re-offense.” Factors placing him at a low risk to reoffend include his lack of discipline while in prison; his educational accomplishments (GED and AS); certificates in viable trades; an understanding of his family dynamics and some of the factors leading to his rebellious behavior as an adolescent; and his last two parole board hearings transcripts were positive. Factors suggesting risk included that the commitment offense involved a gun, violence and injury, and showed a disregard for

⁴ The PCL-R 2 is designed to predict criminal behavior and/or violence, and “[t]he PCL-R 2 is widely used and is supported by years of research in the risk assessment [field]. It has been cross-validated with various forensic populations, including United States males in correctional settings. However, the following results need to be regarded with some level of caution since some individuals may possess idiographic differences that could limit the applicability of this instrument. The evaluator has taken these factors into consideration in determining how much weight to allot to it and in formulating an overall estimate of risk for future violence in the community. Estimates of risk for violence will be presented categorically: low, moderate, or high.”

human life; Jimenez does not know how to conduct his life independently; and his lack of adult experience made him vulnerable to substance abuse relapse.

The evaluation noted that “[h]e has refrained from following his deleterious behavior with regard to gang affiliation and in appropriate peer interaction. . . . [¶] He does not present, nor do records reflect a typical antisocial personality pattern. . . . [¶] These are all positive patterns and suggest low risk for re-offense or subsequent violent behavior.” Nonetheless, risk factors included his lack of adult experience, and the report stated that “he is starting midlife, with a record as a felon and no experience. Given his acts as a teenager, that could pose a risk.”

E. Parole Plans

Jimenez would like to work in furniture manufacture or small engine repair. Because of his ICE hold, he believed he would have to go to Mexico to work. He believed his family will be supportive, and he plans to continue in AA and NA. He does not believe he will have difficulty finding employment, and admitted that he did not have a significant employment history, and he has no experience in paying bills and living independently.

The psychiatric report noted that Jimenez would need structure, supervision, support and abstinence of illicit substances, and that “Mr. Jimenez poses a low risk of violence in the community.”

F. District Attorney’s Position on Parole

The District Attorney opposed parole, primarily because Jimenez had told inconsistent stories about the shooting. When initially arrested, he claimed the victims stopped and yelled out the name of a rival gang. In 2001, he testified he believed there was an exchange of words. In 2005, he testified that his crime partners exhorted him to shoot. The District Attorney viewed the change in the story to be a means of minimizing his conduct. The victims were not a threat, had done nothing, and Jimenez shot repeatedly at a car that contained several individuals, flattening two of its tires and emptying his weapon. Furthermore, in prison Jimenez had acquired tattoos in violation of prison rules.

G. Board Hearing and Decision

Jimenez has had six or seven prior Board hearings. Jimenez testified that at the time of the crime, he believed the car had made a U-turn and the intention of the occupants was to harm him. He could tell they were members of a rival gang by their dress and demeanor, and they made gang hand gestures. As the car approached, Jimenez started shooting and kept shooting as the car passed. He had a gun that night because he felt he needed to protect himself from rival gang members.

Jimenez stated he now felt remorseful for his crimes, and had started to feel that way at the time of his first parole hearing. Although he admitted drinking the night of the shooting, he stated he would not “blame it on the alcohol” because he had stopped drinking earlier that night. He is the only one in his family who has been involved with law enforcement.

One of the hearing officers questioned Jimenez about his 2003 testimony at a Board hearing, where Jimenez had testified that only words and looks were exchanged; at the current hearing, Jimenez testified to hand signs. Jimenez denied testifying at an earlier hearing that words were exchanged.

The Board concluded that Jimenez was unsuitable for parole and that he would pose an unreasonable risk of danger to society or a threat to public safety if released. The Board found Jimenez’s changing story concerning the offense indicated he had been minimizing his participation in the incident until at least 2006, based upon his inconsistent statements from 2001, 2003, and 2005 whether words were exchanged. These statements made it difficult for the Board to determine whether Jimenez had acquired insight into his crime. The Board noted that the offense was committed in a “dispassionate and calculated manner” and that he showed a callous disregard for human suffering.

H. Habeas Corpus Proceedings

Jimenez filed a petition for habeas corpus in the trial court seeking review of the Board’s September 10, 2008 decision denying him parole for one year. On August 11, 2009, the trial court concluded that the record contained “some evidence” to support a

determination that Jimenez currently represented an unreasonable risk of danger to society and was therefore not suitable for release on parole. (*In re Lawrence*, *supra*, 44 Cal.4th at pp. 1205–1206; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 667; Cal. Code Reg. tit. 15, § 2402.) The court noted that although the record did not support the Board’s finding that the offense was callous and dispassionate, Jimenez’s lack of insight into the cause of the offense, as demonstrated by his inconsistent statements, was some evidence supporting the Board’s determination to deny parole. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1260–1261.)

Jimenez filed his petition for writ of habeas corpus in this court on August 28, 2009.

DISCUSSION

Jimenez contends that the full record of his case contains no evidence that the gravity of his commitment offense was probative to the central issue of his current dangerousness, and therefore the Board’s decision does not comply with *In re Lawrence*, *supra*, 44 Cal.4th at p. 1181. Respondent contends his inconsistent statements, evidencing lack of insight, and the gravity of his commitment offense provide some evidence for the Board’s decision denying parole.

A. Governing Law

The purpose of parole is to help prisoners “reintegrate into society as constructive individuals as soon as they are able,” without being confined for the full term of the sentence imposed. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 477 [92 S.Ct. 2593].) Although a prisoner has no constitutional or inherent right to be conditionally released before the expiration of his sentence (*Greenholtz v. Nebraska Penal Inmates* (1979) 442 U.S. 1, 7 [99 S.Ct. 2100]), in this state section 3041 creates in every inmate a cognizable liberty interest in parole, and that interest is protected by the procedural safeguards of the due process clause. (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1205 [“petitioner is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate’s due process right ‘cannot exist in any practical sense without a remedy against

its abrogation,” quoting *In re Rosenkrantz, supra*, 29 Cal.4th 616, 664]; *Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910, 914–915.)⁵

Section 3041, subdivision (b), establishes a presumption that parole will be the rule, rather than the exception, providing that the Board “shall set a release date unless it determines that the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed” (See *Board of Pardons v. Allen* (1987) 482 U.S. 369, 377–378 [707 S.Ct. 2415] [unless designated findings made, parole generally presumed to be available].) “[I]n light of the constitutional liberty interest at stake, judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1211; *Irons v. Carey* (9th Cir. 2007) 505 F.3d 846, 850 [section 3041 vests “California prisoners whose sentences provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause”].)

When assessing whether a life prisoner will pose an unreasonable risk of danger to society if released from prison, the panel considers all relevant, reliable information available on a case-by-case basis. The regulations set forth a nonexclusive list of circumstances tending to show suitability or unsuitability for release. (Cal. Code Regs., tit. 15, § 2402, subds. (c) & (d).) Factors tending to indicate suitability include: (1) the absence of a juvenile record, (2) a stable social history, (3) signs of remorse,

⁵ Section 3041, subdivision (a), provides as relevant: “One year prior to the inmate’s minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. . . . The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime.”

(4) significant life stress motivated the crime, (5) battered woman syndrome, (6) no significant history of violent crime, (7) the inmate's age, (8) realistic plans for the future, and (9) institutional behavior. (*Id.*, Cal. Code Regs., § 2402, subd. (d).) Circumstances tending to show unsuitability include: (1) the commitment offense was committed “in an especially heinous, atrocious or cruel manner,”⁶ (2) a previous record of violence, (3) an unstable social history, (4) sadistic sexual offenses, (5) psychological factors, and (6) serious misconduct while incarcerated. (*Id.*, Cal. Code Regs., § 2402, subd. (c).) “In sum, the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1205.)

The “core determination” thus “involves an assessment of an inmate’s *current* dangerousness.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1205.) The Board is authorized “to identify and weigh only the factors relevant to predicting ‘whether the inmate will be able to live in society without committing additional antisocial acts.’” (*Id.* at pp. 1205–1206, quoting *In re Rosenkrantz, supra*, 29 Cal.4th at p. 655.) In “[d]irecting the Board to consider the statutory factors relevant to suitability, many of which relate to postconviction conduct and rehabilitation, the Legislature explicitly recognized that the inmate’s threat to public safety could be minimized over time by changes in attitude, acceptance of responsibility, and a commitment to living within the strictures of the law.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1219.) As a result, the “statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the

⁶ The regulation specifies the factors to be considered in determining whether the offense was committed in an especially heinous, atrocious or cruel manner as: “(A) Multiple victims were attacked, injured or killed in the same or separate incidents. [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder. [¶] (C) The victim was abused, defiled or mutilated during or after the offense. [¶] (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense.” (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).)

underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.” (*Id.* at p. 1211.) The Board can, of course, rely on the aggravated circumstances of the commitment offense, among other factors, as a reason for finding an inmate unsuitable for parole; however, “the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner’s pre- or postincarceration history, or his . . . current demeanor and mental state, indicates that the implications regarding the prisoner’s dangerousness that derive from his . . . commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety.” (*Id.* at p. 1214.)

B. Standard of Review

“[W]hen a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings.” (*In re Lawrence, supra*, 44 Cal.4th at p. 1212.) The standard is “unquestionably deferential” and “‘limited to ascertaining whether there is some evidence in the record that supports the [Board’s] decision.’” (*Id.* at p. 1210.) Nonetheless, the standard “certainly is not toothless, and ‘due consideration’ of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness.” (*Ibid.*) Our inquiry thus is “not merely whether an inmate’s crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor.” (*Id.* at p. 1221.) The Board must articulate a “rational nexus” between the facts of the commitment offense and the inmate’s current threat to public safety. (*Id.* at pp. 1226–1227 [finding no evidence supported Governor’s determination that Lawrence remained a threat to public safety in

view of her “extraordinary rehabilitative efforts specifically tailored to address the circumstances that led to her criminality, her insight into her past criminal behavior, her expressions of remorse, her realistic parole plans, the support of her family, and numerous institutional reports justifying parole, as well as the favorable discretionary decisions of the Board”]; *In re Ross* (2009) 170 Cal.App.4th 1490, 1497 [Governor’s written decision flawed because it contained no explicit “articulation of a rational nexus between th[e] facts and current dangerousness”].)

C. Analysis

Here, the Board’s determination was based upon two factors: Jimenez’s inconsistent statements whether words or hand gestures precipitated the shooting indicated that he had little insight into the crime, and the “dispassionate and calculated” manner of the offense. These factors do not support a finding of current dangerousness.

In evaluating suitability for parole, we must consider whether “under the statute and the governing regulations, the circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public.” (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1212.)

California Code of Regulations, title 15, section 2402, subdivision (c)(1)(B) provides that the commitment offense was carried out in a heinous, atrocious or cruel manner if “[t]he offense was carried out in a dispassionate and calculated manner, such as an execution style-murder.” However, “the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner’s pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner’s dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public

safety.’ [Citation.]” (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1109.) Although Jimenez admitted he took his gun with him to protect himself from rival gang members and thus indicated he was anticipating violence and willing to engage in it, a gang shooting involving pedestrian-to-car shooting, gestures, words, and intimidation does not show a calculated and dispassionate crime.

Furthermore, Jimenez’s psychiatric evaluations consistently demonstrate that he poses a low risk to reoffend, with the most salient risk factors being his lack of adult experience and prior polysubstance abuse. While the commitment offense involved gang violence and Jimenez was a member of a gang at the time of the offense, he stated he has repudiated his gang affiliations and presented no traits of a typical antisocial personality pattern. During his time in prison, his discipline record has been good. Moreover, his statements concerning whether the victims made hand gestures or spoke to Jimenez at the time of the shooting does not bear on his insight into the crime—both types of conduct constituted threats, and Jimenez has steadfastly asserted the victims’ U-turn meant he was their target. Jimenez has also expressed remorse for the crime.

Additionally, Jimenez has completed significant educational credits and vocational training, has a strong family support structure and insight into his family dynamics, has consistently attended AA and NA meetings while in prison, and has employment plans upon release. Circumstances tending to show a prisoner is suitable for parole include: signs of remorse; “[t]he prisoner’s present age reduces the probability of recidivism”; “[t]he prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release”; and “[i]nstitutional activities indicate an enhanced ability to function within the law upon release.” (Cal. Code Regs., tit. 15, § 2281, subd. (d).) Jimenez has demonstrated his suitability for parole.

DISPOSITION

The petition for writ of habeas corpus is granted, and the Board of Parole Hearing's September 10, 2008 decision is vacated. The Board is directed to find Jimenez suitable for parole unless, within 30 days of the finality of this decision, the Board holds a parole suitability hearing and finds, based on new evidence, that Jimenez currently poses an unreasonable risk of danger to society if released on parole.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.